

ORIGINAL

1 KENNETH G. PARKER (SBN 182911)
kpark@tlpfir.com
2 ROBIN H. ROUNAGHI (SBN 171251)
rrounaghi@tlpfir.com
3 TEUTON, LOEWY & PARKER LLP
3121 Michelson Drive, Suite 250
4 Irvine, California 92612
Telephone: (949) 442-7100
5 Facsimile: (949) 442-7105

FILED

10 MAR 11 PM 12:39

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY: *MFB* DEPUTY

6 THOMAS F.A. HETHERINGTON*
tom.hetherington@emhllp.com
7 JARRETT E. GANER*
jarrett.ganer@emhllp.com
8 EDISON, McDOWELL &
HETHERINGTON LLP
9 3200 Southwest Freeway, Suite 2920
Houston, Texas 77027
10 Telephone: (713) 337-5580
Facsimile: (713) 337-8850
11 * *pro hac vice* motion to be filed

12 Attorneys for
PHL VARIABLE INSURANCE CO.

14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 PHL VARIABLE INSURANCE CO.,

Case No: 10 CV U 521

BTM NLS

17 Plaintiff,

18 v.

19 THE ABRAMS FAMILY
20 IRREVOCABLE LIFE INSURANCE
TRUST, by and through its trustee, H.
21 Bruce Abbott,

22 Defendant.

PLAINTIFF PHL VARIABLE
INSURANCE COMPANY'S
ORIGINAL COMPLAINT

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1 PHL Variable Insurance Company, by and through its attorneys, files this
2 Original Complaint against The Abrams Family Irrevocable Life Insurance Trust,
3 by and through its trustee, H. Bruce Abbott, as follows:

4 **I.**

5 **PARTIES**

6 1. Plaintiff PHL Variable Insurance Company ("Phoenix") is a
7 Connecticut insurance company authorized to transact the business of insurance in
8 California. Phoenix is organized under the laws of Connecticut and its principal
9 place of business is located in Hartford, Connecticut

10 2. Upon information and belief, The Abrams Family Irrevocable Life
11 Insurance Trust (the "Trust" or "Defendant"), is a trust organized under the laws of
12 California. The Trust may be served through its trustee, H. Bruce Abbott
13 ("Trustee"), at his principal place of business, 1905 Diamond St., Suite B, San
14 Marcos, California 92078. Upon information and belief, Trustee Abbott is the only
15 trustee and is a citizen of California.

16 **II.**

17 **JURISDICTION AND VENUE**

18 3. This Court has jurisdiction over all parties of this lawsuit under 28
19 U.S.C. § 1332(a)(1) because Phoenix and Defendant are citizens of different states,
20 and the amount in controversy exceeds \$75,000, exclusive of attorneys' fees,
21 interests and costs.

22 4. Phoenix is a corporation organized under the laws of the state of
23 Connecticut and has its principal place of business in Connecticut. As such, for
24 diversity purposes, Phoenix is a citizen of the state of Connecticut.

25 5. Upon information and belief, the Trust is organized under the laws of
26 California and the sole Trustee is a resident of the state of California. As such, for
27 diversity purposes, the Trust is a citizen of the state of California.

6. As Phoenix and the Trust are citizens of different states, a diversity of citizenship exists.

7. As set forth more fully below, this case involves an adjudication of the rights and obligations under an insurance policy with a face value far in excess of \$75,000. Additionally, this case involves an adjudication of the disbursement of premiums paid on this policy, also far in excess of \$75,000.

8. The Trust is subject to the personal jurisdiction of this Court, as the Trustee is a resident of California and the Trust was established under California law.

9. This Court has jurisdiction over this declaratory judgment action pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202, which grant the United States District Courts jurisdiction to declare the “rights and other legal relations of any interested party making such declaration, whether or not further relief is or could be sought.”

10. Venue is proper for this action pursuant to 28 U.S.C. § 1391, since the Trust is a citizen of California, its Trustee is located in San Diego County, and the insurance policy at issue is governed by California law. In addition, all or a portion of the events giving rise to the cause asserted herein occurred in the state of California.

III.

FACTUAL BACKGROUND

11. Phoenix is, and during all relevant times has been, in the business of underwriting and issuing policies of life insurance and is authorized to transact the business of insurance in the state of California.

12. On or about November 24, 2007, the Trust, by and through its Trustee, applied in writing (the “Application”) to Phoenix seeking the issuance of an insurance policy insuring the life of Howard Abrams (“Abrams”).

1 13. In completing this Application, Abrams and the Trust provided
2 Phoenix with material information regarding, among other things, Abrams's net
3 worth and annual income. In completing the Application, Abrams and the Trust
4 knew that each was required to provide complete, accurate and honest answers to
5 the questions presented on the Application. Abrams and the Trust also knew that
6 Phoenix would rely upon the answers recorded on the Application in determining
7 whether Abrams was insurable and qualified for the insurance sought through the
8 Application.

9 14. Abrams and the Trust, through its Trustee, responded to clear, direct
10 questions seeking material information regarding Abrams's net worth and annual
11 income. In response to these questions, the Application represented that Abrams
12 had a net worth of \$23,652,000 and annual earned income of \$150,000. As
13 discussed more fully in the ensuing paragraphs, these representations were false
14 and were each material to Phoenix's acceptance of the risk assumed.

15 15. Additionally, during the application process, Abrams and the Trust
16 represented that the life insurance was being sought for “estate planning.” This
17 statement was false and was material to Phoenix’s acceptance of the risk assumed.

16. The Application contained the following affirmation:

I have reviewed this application, and the statements made
herein are those of the proposed insured and all such
statements made by the proposed insured in Part I or and
in Part II of this application are full, complete, and true to
the best knowledge and belief of the undersigned and
have been correctly recorded.

25 Abrams executed the Application on November 20, 2007 and the Trust, through its
26 trustee at the time, executed the Application on November 24, 2007.

1 17. On the basis of the statements and representations on the Application
2 and in reliance upon Abrams's and the Trust's complete candor, honesty and
3 openness in disclosing information in the response to the questions presented on
4 the Application, Phoenix issued life insurance policy number 97526412 (the
5 "Policy") to the Trust, with an effective date of March 15, 2008. The Policy's
6 death benefit is \$10,000,000.

7 18. Upon information and belief, contrary to the representations contained
8 on the Application, Abrams did not have a net worth of \$23,652,000 or annual
9 earned income of \$150,000 on the date of the Application. In an effort to verify
10 that the financial representations contained in the Application were true and
11 correct, Phoenix's own independent investigation did not reveal any basis on
12 which a person could reasonably conclude that Abrams had a net worth of
13 \$23,652,000 or annual earned income of \$150,000 on the date of the Application.
14 Phoenix asserts that the statements made during the application process with
15 respect to Abram's net worth, annual income, source of funding and purpose for
16 the life insurance were each materially incorrect and/or fraudulent.

17 19. Had Abrams and the Trust provided accurate responses on the
18 Application regarding these items, Phoenix would not have issued the Policy or
19 would have done so on materially different terms. As a result of the Policy's
20 issuance, Phoenix has suffered damages, including but not limited to commissions
21 Phoenix paid to its sales representatives that it would not have paid, but for the
22 sale.

23 20. Phoenix brings this action seeking rescission of the Policy and an
24 order declaring the Policy void *ab initio*.

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IV.

COUNT I: DECLARATORY JUDGMENT

21. Phoenix incorporates herein by reference each of its allegations contained in Paragraphs 1–20 above.

22. Pursuant to the Federal Declaratory Judgment Statute, 28 U.S.C. § 2201, Phoenix seeks a declaratory judgment that the Policy is null, void and rescinded *ab initio* due to the fraudulent and/or material misrepresentations and omissions that Abrams and the Trust made on the Application.

23. Phoenix has been damaged as a result of the foregoing material misrepresentations, in that it has incurred expenses and costs in connection with, among other things, its underwriting and issuance of the Policy, payments of commissions and fees in connection with the issuance of the Policy, administration and servicing of the Policy, investigation of the misrepresentations and concealments detailed above, and commencement of this action to enforce its rights.

24. Phoenix also seeks a declaratory judgment that, pursuant to Section 483(c) of the California Insurance Code, the Trust is not entitled to a return of the Policy premiums due to actual fraud. Alternatively, in light of the foregoing damages, expenses, and costs incurred by Phoenix, Phoenix should be permitted to retain the premiums paid for the Policy as an offset against such damages and costs and/or disgorgement of Defendant's ill-gotten gains. Without such retention, offset, and/or disgorgement, restitution of the parties to their pre-contract position would be impossible. Phoenix therefore seeks a declaration judgment that Phoenix be allowed to offset from the Policy premiums an amount equal to the commissions paid to its agents or sale representative arising out of or relating to the sale of the Policy, other costs associated with the Policy, as well as its attorneys' fees and expenses.

1 25. Notwithstanding the foregoing, Phoenix hereby fully and
2 unconditionally tenders the Policy's premiums to the Court's registry.

3 26. Phoenix also seeks its fees pursuant to the Federal Declaratory
4 Judgment Statute.

V.

RELIEF REQUESTED

7 WHEREFORE, due to the above-reference fraudulent and/or material
8 misrepresentations, PHL Variable Insurance Company demands judgment against
9 The Abrams Family Irrevocable Life Insurance Trust as follows:

- (a) an order declaring and adjudging the Policy of life insurance bearing Policy Number 97526412 to be null and void and rescinded, *ab initio*;
 - (b) an order directing that Phoenix deposit with the Clerk of the Court all premiums paid on the Policy along with required interest, if any;
 - (c) an order that the Clerk of the Court pay to Phoenix from any premiums deposited with the Court an amount equal to the premiums paid on the policy or, alternatively, the total of: 1) the commissions paid by Phoenix to the agents or sale representative arising out of or relating to the sale of the Policy; and 2) any damages incurred by Phoenix as a result of the Policy's issuance and subsequent investigation, including attorneys' fees and expenses;
 - (d) an order awarding cost of suit and reasonable attorneys' fees pursuant to the Federal Declaratory Judgment Statute; and

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1 (e) an order awarding such other relief as the Court deems equitable and
2 just to Phoenix.

3 Dated: March 11, 2010

4 TEUTON, LOEWY & PARKER LLP
5 KENNETH G. PARKER
6 ROBIN ROUNAGHI

7 By:

8 
9 Kenneth G. Parker
10 Attorneys for Plaintiff
11 PHL VARIABLE INSURANCE CO.

12 OF COUNSEL:

13 EDISON, McDOWELL & HETHERINGTON LLP
14 Thomas F.A. Hetherington, Texas Bar No. 24007359
15 Jarrett E. Ganer, Texas Bar No. 24055520

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CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

PHL VARIABLE INSURANCE CO.

(b) County of Residence of First Listed Plaintiff Connecticut
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Kenneth G. Parker, Esq., Teuton, Loewy & Parker LLP
3121 Michelson Dr. #250, Irvine, CA 92612; 949/442-7100**DEFENDANTS**

THE ABRAMS FAMILY IRREVOCABLE LIFE INSURANCE TRUST, by and through its trustee, H. Bruce Abbott

County of Residence of First Listed Defendant JUNIOR P. Abbott Salt Lake City

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

BY:

'10CVU521

BTM NLS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- | | |
|--|--|
| <input type="checkbox"/> 1 U.S. Government Plaintiff | <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input checked="" type="checkbox"/> 4 Diversity
(Indicate Citizenship of Parties in Item III) |

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

Citizen of This State	PTF	DEF	PTF	DEF
<input type="checkbox"/>	<input type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4 <input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5
<input type="checkbox"/>	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	PROPERTY RIGHTS	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	PERSONAL PROPERTY	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Depatration
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 850 Securities/Commodities Exchange	<input type="checkbox"/> 480 Consumer Credit
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 490 Cable/Sat TV
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	LABOR	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410
<input type="checkbox"/> 196 Franchise		<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	SOCIAL SECURITY	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 861 HIA (1395ff)	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/ Accommodations	<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	IMMIGRATION	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 445 Amer. w/Disabilities - Employment	<input type="checkbox"/> 462 Naturalization Application	<input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 900Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 446 Amer. w/Disabilities - Other	<input type="checkbox"/> 463 Habeas Corpus - Alien Detainee		<input type="checkbox"/> 950 Constitutionality of State Statutes
	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN

(Place an "X" in One Box Only)

 1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from another district (specify) 6 Multidistrict Litigation 7 Appeal to District Judge from Magistrate JudgmentCite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 U.S.C. § 1332Brief description of cause:
Declaratory Judgment - Rescission due to material misrepresentations**VII. REQUESTED IN COMPLAINT:** CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE **BARRY TED MOSKOWITZ**09-cv-2606-BTM-POR; 10-cv-0240-BTM-POR
DOCKET NUMBER 09-cv-02344-BTM-POR

DATE

SIGNATURE OF ATTORNEY OF RECORD

03/11/2010

FOR OFFICE USE ONLY

RECEIPT # **11045** AMOUNT **\$350 -**

APPLYING IFFP

JUDGE

MAG. JUDGE

BB 03.11.10

DUPLICATE

Court Name: USDC California Southern
Division: 3
Receipt Number: CAS011045
Cashier ID: mbain
Transaction Date: 03/11/2010
Payer Name: NORCO DELIVERY SERVICES

CIVIL FILING FEE

For: PHL VARIABLE INSURANCE V ABRAM
Case/Party: D-CAS-3-10-CV-000521-001
Amount: \$350.00

CHECK

Check/Money Order Num: 26403
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

There will be a fee of \$45.00
charged for any returned check.